(33,910)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 601

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS,

vs.

GAMBLE LATROBE, JR., JAMES P. KNOWLES, AND WILLIAM S. ERICHS, TRUSTEES, ETC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE

No. 579. In Bankruptcy

In the Matter of THERMIODYNE RADIO CORPORATION, Bankrupt

In the Matter of the Petition of the PEOPLE OF THE STATE OF NEW YORK, Claimant, to Review the Order of the Referee Disallowing the Claim of the State of New York for $15,000.00 License Tax

NOTICE OF APPEAL

SIR: Please take notice that the People of the State of New York hereby appeal from the order made herein on the 23 day of May, 1928, affirming the order of the referee in bankruptcy, disallowing, rejecting and expunging the [fol. 2] said claim from the list of claims upon the records in the above stated cause and dismissing the petition to review said order filed by the petitioner, the People of the State of New York.

Dated June 9, 1928.

Yours, etc., Albert Ottinger, Attorney-General of the State of New York, Attorney for Petitioner-Appellant, the People of the State of New York. Office and Post Office address: Capitol, Albany, New York.

To Ralph Montgomery Arkush, Esq., attorney for trustees in bankruptcy, No. 15 Broad Street, New York City.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the United States District Court for the District of Delaware:

Your Petitioner, the People of the State of New York, conceiving itself aggrieved by the certain Order entered on

the 23 day of May, 1928, in the above entitled proceeding, affirming the Order of the Referee in bankruptcy herein, rejecting, disallowing and expunging the claim of the Petitioner, the People of the State of New York, for license tax amounting to $15,000.00 from the list of claims upon [fol. 4] the record in the above stated cause, directing that the petition for the review of said Referee's Order, heretofore filed in this Court on behalf of the said petitioner, the People of the State of New York, be dismissed, hereby petition for an appeal from the said Order to the United States Circuit Court of Appeals for the Third Circuit, and prays that its appeal may be allowed and that a citation may be granted, directed to the trustee herein, demanding them to appear before the United States Circuit Court of Appeals for the Third Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said cause, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Third Circuit; and in connection with this petition, the said petitioner, the People of the State of New York, herewith presents its Assignment of Errors.

Dated June 5, 1928.

(Sgd.) Albert Ottinger, Attorney-General of the State of New York, Attorney for Petitioner, the People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

[fol. 5] IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

And now, to wit, this eighth day of June, A. D. 1928, upon reading and considering the foregoing petition, it is, upon motion of Albert Ottinger, Esq., attorney for appellant,

Ordered by the Court that the foregoing appeal be and hereby is allowed, and the Trustees of said bankrupt, by James I. Boyce, Esq., their attorney, waiving the giving of bond for costs by appellant, no order as to bond is made.

(Sgd.) Hugh M. Morris, J.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes the People of the State of New York, petitioner-appellant, and files this, its Assignment of Errors, and in connection with its petiton for appeal say that in the record of proceedings and in an order made and entered herein on the 23 day of May, 1928, manifest error hath intervened to the prejudice of the appellants, to wit:

1. That the Court erred in affirming the order of the Referee in bankruptcy, disallowing the claim for license fee [fol. 7] or tax of the people of the State of New York in the sum of $15,000.00 and dismissing the petition for a review of said order by said Referee filed by the said petitioner, the People of the State of New York, in that the Court in making said Order held that Section 181 of the Tax Law of the State of New York, providing for the assessment of 6¢ a share on stock of no par value, was a statutory enactment in violation of the equal protection clause of the 14th Amendment of the Constitution of the United States, and was unconstitutional, whereas in law and in fact said statutory enactment providing for a license fee payable by foreign corporation seeking to do business in the State of New York was a constitutional exercise of the taxing power of the State of New York and in none of its terms and conditions violated any of the provisions of the 14th Amendment of the Constitution of the United States.

2. That the Court erred in making the order complained of and holding that § 181 of the Tax Law of the State of New York, relating to the method of assessment of the amount of license fee upon the stock of a corporation having no par value, was unconstitutional, whereas said statute was a constitutional exercise of the power of the Legislature of the State of New York in determining the amount to be paid as license fee by a foreign corporation as a condition for permission to do business within the territorial jurisdiction of the State of New York; that the State of

New York possessed the absolute power of exclusion of foreign corporations, and had the absolute right to fix and [fol. 8] determine any tax or license fee as a condition for granting that which it arbitrarily withholds.

3. That the Court erred in making the order complained of and holding that § 181 of the Tax Law of the State of New York violated the equal protection clause of the 14th Amendment of the Constitution of the United States and was unconstitutional by reason thereof, whereas in law and in fact the provisions of § 181 of the Tax Law of the State of New York applied in equal degree to all foreign corporations seeking to do business in the State of New York, and operated equally and in like manner on all corporations falling within the particular classification of foreign corporations.

4. That the Court erred in making the order complained of and holding that the Legislature of the State of New York, in assessing the license fee or tax of 6¢ on each share of stock of no par value employed in said State, acted in an arbitrary and unconstitutional manner, whereas the legislative enactment upon which the claim of the State of New York for license fee rests was a reasonable exercise of the legislative discretion in placing foreign corporations doing business in the State of New York on equal terms with domestic corporations organized and doing business in the said State, and the provisions of § 181 of the Tax Law of the State of New York was designed to prevent foreign corporations from doing business to the disadvantage of domestic corporations deriving their proper rights and privileges from the State of New York.

[fol. 9] 5. The Court erred in making the order complained of in entertaining the defense of the unconstitutionality of § 181 of the Tax Law of the State of New York, relating to the assessment of a license fee on the stock of a foreign corporation having no par value, in that the Thermiodyne Radio Corporation, the bankrupt in this proceeding, applied for and received the right to do business in the State of New York upon the undertaking that, when the lapse of the statutory period made possible the determination of the proportion of its capitalization employed in business in the State of New York, it would pay the amount

of license fee as then calculable, the amount thereof relating back to the date of receiving the privilege applied for from the State of New York; that the bankrupt corporation herein has availed itself of and enjoyed the privileges and rights conferred by the State of New York in the issued permission to do business within the said State, and that said corporation was and is, and that the trustees and receiver of said corporation, standing in its place, were and are, estopped and precluded from asserting the unconstitutionality of the Statute relating to assessment of the license fee.

6. That the Court erred in making the order complained of and holding that the valuation of stock of no par value was determinable by the value of assets of the corporation used by it in the transaction of business in the State of New York during the period of one year subsequent to the issuance of the license to transact business in the State of New York; whereas in law and in fact the license fee ex-[fol. 10] acted by the State of New York under Section 181 of the Tax Law of said State of New York was for the admission of the corporation to the State of New York for the transaction of its business therein and was not dependent upon any business actually transacted or any assets except as the amount of said assets are necessary to be determined to insure a proper segregation of the stock of said corporation so as to determine the proportion thereof employed in the State of New York and thus further to determine the amount that the corporation should pay, in accordance with its stipulated agreement for the license issued to it to transact business in the State of New York.

7. The Court erred in making the order complained of in entertaining any defense to the method of assessment of the license fee herein on the ground that the Thermiodyne Radio Corporation, the bankrupt corporation, had a right or remedy of review of the assessment of said license fee before the State Tax Commission of the State of New York, and through certiorari to the Supreme Court of the State of New York under § 199 of the Tax Law of the State of New York, which remedy of adjustment or review has not been taken by either the corporation or the receiver or trustees in this proceeding, and that, in the absence of ex-

hausting such remedy, neither the referee nor the United States District Court for the District of Delaware had any jurisdiction to review the finality of the assessment as made by the State Tax Commission of the State of New York.

[fol. 11] Wherefore the Appellants pray that the order of the United States District Court for the District of Delaware, affirming the order of the referee, disallowing the claim of the State of New York for $15,000 license tax and dismissing the petition to review said order of the referee, heretofore filed in this Court, be reversed with costs, and that the cause be remitted to the United States District Court, District of Delaware, for such further proceedings as may be in conformity with justice and equity.

Dated: June 5, 1928.

(Sgd.) Albert Ottinger, Attorney-General of the State of New York, Attorney for Appellants, The People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fols. 12 & 13] Citation, in usual form, showing service on James I. Boyce, omitted in printing.

[fol. 14] In United States District Court

Proof of Claim

Notice of Assessment and Receipt.

State Tax Department, Albany, N. Y.

Date: Dec. 21, 1926.
Refer to File No. A, 446683.

Thermioslyne Radio Corp., c/o John Biggs, Jr., ref., Equitable Bldg., Wilmington, Del.

Notice is hereby given that there has been assessed against you the amount set below as a license fee. It is now payable.

Certified Checks, Money Orders or Bank Drafts should be payable to and forwarded to State Tax Commission, Albany, N. Y., with this form.

Foreign license fee under § 181 of the tax law.

Uncertified checks not accepted.

For License for the privilege of exercising its corporate franchise or carrying on business based on amount of Capital Stock or number of shares employed in New York State, per Section 181 of the Tax Law.

This notice must be returned at the time payment is tendered, as when properly signed it becomes a receipt.

Number of shares, no par value, 250,000; tax 6c. per share, $15,000.00.

[fol. 15] Please take notice that annexed hereto is a statement of franchise taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the bankrupt and claims submitted to you and demands that said amount be forthwith paid by you in full out of any moneys now in or which may hereafter come into your possession.

Dated December 21, 1926.

Albert Ottinger, Attorney General of the State of New York. Office and P. O. address: Capitol, Albany, N. Y.

United States District Court, District of New York

In Bankruptcy. No. —

In the Matter of Thermiodyne Radio Corp., Bankrupt

Claim of the State of New York for Taxes

Amount $15,000.00 plus accrued interest.

Priority and lien claimed.

Albert Ottinger, Attorney-General, Attorney for claimant. Office and P. O. address: Capitol, Albany, N. Y.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

REFEREE'S NOTICE OF OBJECTION TO CLAIM

Claim No. 116

To State Tax Department, Albany, New York, and Albert Ottinger, Esq., Albany, New York, its attorney:

You will Please Take Notice that the Trustees herein have filed a petition asking that your claim against the above-named bankrupt be reexamined and rejected for the reasons set forth in the said petition, of which a copy is hereto attached, and that a hearing will be had on such petition at the office of the undersigned, No. 510 Equitable Building, Wilmington, Delaware, on the 30th day of September, A. D. 1927, at two o'clock P. M.

Dated, September 12th, 1927.

John Biggs, Jr., Referee in Bankruptcy.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRUSTEE'S PETITION FOR REJECTION OF CLAIM

To John Biggs, Jr., referee in bankruptcy:

Your petitioners respectfully show:

(1) That they are the Trustees herein.

(2) That the proof of debt of State of New York claiming to be a creditor of the said Thermiodyne Radio Corporation was filed herein on the Eighth day of January, A. D. 1927, and on the same day duly allowed.

(3) That the same should not have been allowed for the following reasons:

For that, the said Thermiodyne Radio Corporation is not indebted to the State of New York for any license fee in the sum of $15,000 or in any other sum whatsoever.

For that the said alleged claim is not entitled to any priority whatsoever.

[fol. 18] (4) That the attorney for the said claimant is Albert Ottinger, Esq., Attorney General, Albany, New York.

(5) That no previous application has been made to this or any other Court for the order hereinafter asked.

Wherefore, your petitioners pray that the said proof of debt may be reconsidered and rejected.

Gamble Latrobe, Jr., James B. Knowles, William S. Erichs, Trustees, by Gamble Latrobe, Jr. James I. Boyce, Attorney for Trustees.

Duly sworn to by Gamble Latrobe, Jr. Jurat omitted in printing.

[fol. 19] And now, to wit, this 12th day of September, A. D. 1927, upon reading and filing the petition of the Trustees herein praying for a re-examination of the claim of State of New York, Albany, New York, and upon motion of James I. Boyce, Esq., attorney for the Trustees,

It is ordered that such re-examination be had and that the hearing thereon be fixed for the 30th day of September, A. D. 1927, at two o'clock P. M. at the office of the Referee, No. 510 Equitable Building, Wilmington, Delaware.

John Biggs, Jr., Referee in Bankruptcy.

[fol. 20] In United States District Court

Claims 108 and 116—New York State Tax Department

In re Thermiodyne Radio Corporation

Minutes of Hearing Before Referee

Before John Biggs, Jr., Esq., Referee

Wilmington, Delaware,

Friday, September 30, 1927—at 2 o'clock p. m.

Appearances of Counsel

Ralph M. Arkush, Esq., New York City.

James L. Boyce, Esq., Wilmington, for the Trustees.

Appearance:

Albert Ottinger, Esq., Attorney-General of the State of New York, by

William Matthews, Esq., Deputy Assistant Attorney General, for the Claimant, Department of Taxation and Finance of the State of New York.

CHARLES W. HUTCHINS was called as a witness on behalf of the claimant and, being duly sworn, testified as follows:

Direct examination by Mr. Matthews:

I reside at Rockaway Beach, N. Y. I am license clerk in the Department of Taxation and Finance of the State of New York.

Referring to the claim for license fee in the sum of $15,000 (Claim No. 116 in this proceeding) this license fee was assessed on the basis of a report filed by the bankrupt [fol. 21] corporation, the 1925 franchise tax report filed in the office of the Department of Taxation and Finance June 12th, 1925, as shown by the stamp on the face.

Report produced, offered in evidence and marked "State of New York, Tax Department, Exhibit No. 1."

The report indicates that this corporation began business in New York in November, 1924; that it had issued capital stock outstanding to the number of 250,000 shares of no par value. The tax was computed at the rate of six cents per share as provided by Section 181 of Article 9 of the Tax Law. The report further indicated that all of this corporation's capital was employed in New York, and that it had a place of business at Plattsburg, New York, and maintained no place of business where the corporation maintained any permanent store, warehouse, factory or other place to continue its business outside of the State of New York. No part of this license fee has been paid. This is the only report this corporation has ever filed.

Cross-examination by Mr. Boyce:

The Department of Taxation and Finance made no efforts to determine the actual value of the assets of the corporation. The tax assessed had no relation to the actual value of the assets. The so-called license fee or tax was assessed at the rate of six cents per share on each share of no par value stock regardless of the value of the assets of the cor- [fol. 22] poration. The elements which entered into the

calculation were the number of shares, the rate per share, and the location of the gross assets of the corporation and where employed and doing business. In this case all the assets were in New York State.

By the Referee:

The $15,000 tax is based on a report indicating the rate per share in relation to the portion of gross assets employed in New York State. The franchise tax is based upon the outstanding capital stock of no stated par value which is apportioned for taxation purposes in accordance with the proportionate amount of assets employed in New York State. They are both on the same basis in determining the percentage of capital taxable in New York State.

By Mr. Boyce:

The license fee or tax was assessed under Section 181 of Article 9 of the New York State Tax Law, amended by Chapter 332, Laws 1924, under the provision, "On the issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the State, a license fee of six cents on such shares employed in this State," and other provisions of the same section.

Redirect examination by Mr. Matthews:

The license fee was assessed December 21st, 1926.

[fol. 23] J. Eugene Meyer, called as a witness on behalf of the trustees and being duly sworn, testified as follows:

By Mr. Arkush:

I was comptroller of the bankrupt corporation, and was, in that capacity, familiar with the books and accounts of the bankrupt. I have seen State Tax Exhibit No. 1. I have seen the question therein "The average price at which this corporation sold stock during the year, high and low, high is 22 1/2 and low 6 1/2." At the high price of 22 1/2 and the number of issued shares as shown by the report

of 250,000, that would give a valuation of $5,625,000 to the net assets of the company, and, at the low price of 6 1/2, a valuation of $1,625,000. The high figure mentioned had no relation to the actual net value of the assets of the corporation. Since commencing business in New York State, the corporation never operated at a profit, but at a loss. It carried its patents and good will at approximately the figure of $1,379,000. I have no knowledge whether these patents were ever sold by the corporation or the trustee in bankruptcy. I personally made an effort to procure a purchaser for these patents but was unsuccessful.

On or about November 19th, 1925, the actual book value of the assets of the corporation exceeded its liabilities. The actual value did not exceed the amount of liabilities. The book value was about $900,000 in excess of liabilities. At that time the patents and good will were carried in excess of $1,000,000. I do not think that the figures for ac- [fol. 24] counts receivable reflect the true value of these accounts. I have checked the actual receivable value of the accounts receivable, and find a shrinkage from approximately that date of between $100,000 and $150,000. And the inventory at that date was carried on its cost value. That cost value, upon conversion of the inventory into cash, showed a shrinkage of over 26 per cent. The real estate and machinery and other fixed assets were carried at cost with adequate depreciation, which valuation showed a shrinkage.

Q. Approximately how much?

The Referee: Mr. Arkush, that certainly is immaterial.

Mr. Arkush: If your Honor please, the law states——

Mr. Matthews: I have a blanket objection, as I understand it, to all this.

Mr. Arkush: That is understood.

The Referee: But your question is directed to the shrinkage of the tangible assets of the corporation at the time they were sold, which was long after the period at which this tax was assessed. In other words, the witness, in answering this question now would not in any degree indicate what was the value of a plant after depreciation in 1924.

[fol. 25] Mr. Arkush: I do not think as practice goes one year is very high—a long time.

The Referee: I think on machinery of the sort that this company had there would certainly have to be evidence to connect it with what it was in 1924.

Mr. Arkush: That goes to the probative effect of it.

The Referee: There is nothing before me that would permit me to make such a finding. I think that is immaterial.

Of the 250,000 shares referred to in the report, there was somewhere in the neighborhood of 196,000 shares put in escrow, deposited at different banks and to be realized only by a cooperative arrangement. That stock had been issued for patents of the company and did not represent cash investment. H. D. Williams & Company was the brokerage or banking house connected with the floating of the stock. The bankrupt had offices at Chicago and San Francisco. It took orders for delivery outside of the State of New York, and shipped its goods outside—of the State of New York.

For the shares that were issued for cash, there was received about seven and a quarter dollars per share. The company never received any assets other than the cash it received from its stock and what it bought with that cash, and the patents that were received for the balance of the stock.

[fol. 26] State Tax Exhibit 1

Form Set 4-9-25-300,000 (26-5466)

Every Corporation Incorporated Prior to Nov. 1, 1925, Must Report

Franchise Tax on Business Corporations

Every Corporation Incorporated Prior to July 1, 1925, Must Make This Report to State Tax Department, Albany, N. Y.

This report is Due July 1, 1925. Corporations filing reports with the United States Treasury Department after June 1, 1925, for a fiscal year ending before July 1, 1925,

must file this report within thirty days after such filing and give date of filing federal report.

The report must cover the conditions and the entire net income for the corporation's last fiscal year ending on or before June 30, 1925.

New Corporations see special instructions at bottom of page three (3).

Name of corporation (exact corporate title): Thermiodyne Radio Corporation.

Mail address: 1819 Broadway, New York City.

(Full details for delivery of blanks and notices of assessment must appear above.)

I make the following report of such company for the year ending December 31, 1924, or the fiscal year ending —— —, ——, pursuant to Article 9-A of the Tax Law.

(Date inserted above must be the same as given in the answer to (8) below.)

[fol. 27] (1) Organized Oct., 1924, under the Laws of Delaware.

(2) Began business in New York Nov., 1924.

(3) If not incorporated under the laws of New York, has it been legally authorized to do business in New York State? Yes.

(4) Authorized capital stock, $——.

(5) Amount of average indebtedness for year, $——. (Exclusive of capital stock.)

Answers to item 6 below must be as of June 30, 1925. Par value per share, ——. Total par value, ——. Dividends paid, ——.

(6) Number of shares, Common, issued: ——. $——. $——. $——. Number of shares, Preferred, issued: ——. $——. $——. $——. Number of shares without par value, issued: 250,000; amount paid in on same, $580,000; $none; total issued, $580,000.

Any capital stock issued or subscribed after June 30, 1928, and prior to November 1, 1925, must be reported to the State Tax Department, Corporation Bureau, within 30 days.

(7) If your fiscal year has been changed since July 1, 1923, how? ——.

(8) Entire net income for the year ending December 31, 1924, or the Fiscal Year (Period) Commencing —— —,

——, and Ending —— ——, ——, as shown by its report to the United States Treasury Department, $——. No report made to Federal Government.

[fol. 28] (NOTE.—The above answer must be based on the last report filed with the Federal Government for a period ending between July 1, 1924, and June 30, 1925, inclusive.)

(9) Dividends received from corporations not included in (8), $——.

(10) State amount of interest received from Federal, state, municipal, or other obligations, not included in item (8). $——.

(11) Total Gross Income reported at item 11 on Federal Income Tax Return for the above period, $——.

(11-a) Deductions (as shown on federal report):

(a) Compensation of officers	$
(b) Rent on business property	
(c) Repairs	
(d) Interest	
(e) Taxes (Item 16 Fed. Rpt.)	
(f) Losses by fire, storm	
(g) Bad debts	
(h) Depreciation	
(j) Depletion	
(k) Other deductions not shown above must be shown in detail on sheet attached	
Total Deductions shown above	$
Item 11 above less item 11-a above	

(12) If the entire net income as first returned was changed by the Federal Government, state the amount of such entire net income as finally determined for the year ending:

—— ——, 1916	$
—— ——, 1917	
—— ——, 1918	

[fol. 29]

—— ——, 1919	$
—— ——, 1920	$
—— ——, 1921	$

—— —, 1922..... $....
—— —, 1923..... $....
(Insert Month and Day.)

(13) If a corporation is not organized under the laws of any state within the United States it should return its entire net income, wherever earned. $——.

(14) If the amount reported in (8) is inaccurate, state the amount claimed to be correct. $——.

(15) Nature of business and how transacted: Mfg. Radio Receivers.

(16) Place, street and number where business is conducted: 33-39 So. River St., Plattsburg, N. Y.

(17) State the city or town, street number and state where the company maintained any permanent store, warehouse, factory or other place of continuous business outside the State of New York during the year. None.

(18) Any corporation except one having stock without par value, may omit the segregation of assets on page 2 only by signing the following consent: I am authorized by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income at 4½ per cent or upon its entire issued capital stock at one mill on the dollar, as provided by law.

(Do not sign consent unless taxable by the State of New
[fol. 30] York on entire income or entire issued capital stock.)

——.

(19) Does this corporation own a majority of the stock of another or other corporations? No. Give name of each and amount held. ——.

(20) Is a majority of the stock of this corporation owned by another corporation? No. If so, by what other? ——.

(This Report must be sworn to on page four.)
(All questions on this page must be answered.)
The notes on page three should be read carefully.

[fol. 31] Must be Answered

(21) Did this corporation file a consolidated report with the United States Treasury Department? No.

(21-a) If so, state amount of consolidated net income. $——.

(22) Were its income and assets included in the consolidated report of another corporation? No.

If so, name of corporation reporting the consolidated net income, —— ——, and amount of net income so reported. $——.

(23) Give the names and net income or loss attributable to each corporation, including the reporting corporation, included in the consolidated report, and specify whether gain or loss. ——.

(24) Has this corporation since January 1, 1917, either directly or indirectly, acquired by merger, consolidation or purchase, the major part of the assets or the franchise of any other corporation or corporations? [No.]*

Has it merger or consolidated any other corporation or corporations? [No.]*

If so, give name of each corporation and date of acquisition, merger or consolidation. —— ——.

(25) Has the entire net income of any corporation which has been acquired by, or merged or consolidated with this company been changed by the Federal Government, and not heretofore reported to the State Tax Department? (Answer yes or no) [No.]*

If changed, reduce such changes to affidavit form and file with this report.

[fol. 32] Segregation of Assets

(Must not include those of any other corporation.)

Read: The following segregations must be made by all corporations having stock without par value and all corporations which have not signed consent (18).

Total Segregated Assets Wherever Located

(a) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from personal prop-

[*Word enclosed in brackets erased in copy.]

erty sold by the corporation from merchandise manufactured by it within and without this state	$150,000 00
(b) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans	
†Average monthly value of all its real property wherever located (actual value)	60,000
†Average monthly value of all its tangible personal property wherever located (actual value)	20,000
†Average total actual value of shares of stocks [fol. 33] of other corporations owned by this corporation (notes, bonds, cash and evidences of debt must not be included). (Note: List of shares must be made on separate sheet and show corporate name, number of shares held, par value per share, actual value.)	
Total	$230,000.00

Does the segregation above made include assets of any subsidiary or other corporation? No.

Additional Information

To be used to determine fees under §181 of tax law and one mill tax

(1) Average monthly book and cash balance during the year	$50,000 00
(2) Average value of bills and accounts receivable during the year arising from advances or loans and not included above	
(3) Average value of bonds, loans on call and other financial securities wherever held, used or employed during the year (not including shares of stock)	

[fol. 34] Assets Segregated to New York State Only

(a) Average monthly value of bills and accounts receivable arising from personal property sold by the corporation from merchandise manufactured by it within this State	$150,000 00
(b) Average monthly value of bills and accounts receivable arising from personal property owned by the corporation and not manufactured by it within this State but sold by it or its agents and located within the State at the time of the receipt of the order	
(c) Average monthly value of bills and accounts receivable arising from the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the State and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this State	
(d) Average monthly value of bills and accounts receivable arising from services performed, by any officer, agent or representative of the corporation con- [fol. 35] nected with, sent from, or reporting, either directly or indirectly, to any officer located in this State or at any office located, owned, rented or occupied in this State	
†Average monthly value of its real property within this State as detailed in this report (actual value)	60,000
†Average monthly value of its tangible personal property in New York State as detailed in this report (actual value)	20,000

§Average total actual value of shares of stocks of other corporations owned by it and allocated to this State by rule below ....

Total $230,000 00

Additional Information

To be used to determine fees under §181 of tax law and one mill tax

(1) Average monthly bank and cash balance in New York State during the year.... $50,000 00

(2) *Average value of all bills and accounts receivable in New York State during the year ..... None

(3) Average value of bonds, loans on call and other financial securities held, used or employed in New York during the year (not including shares of stock) ..... None

[fol. 36] *All bills and accounts receivable due for goods located in New York State at the time of sale or receivable by the corporation at an office within New York State and not already included in (a), (b), (c), and (d), in assets segregated to New York State, must be included in this item.

†Real property and tangible personal property shall be taken at its actual value where located.

§The value of shares of stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the State in accordance with the value of the physical property in and out of the State representing such share stock.

Average Price at Which This Corporation's Stocks Sold During the Year

		High	Low
Common	.....	.....	.....
Preferred	.....	.....	.....
No par	250,000	22½	6½

How many shares of the corporation's stock were transferred on its books during the period covered by this report? ——.

Above must be answered.

Distribution Schedule (Must be Completed)

If the company's entire tangible personal property in this State is in one city, or in one town outside a city or incorporated village, the schedules below need not be made, [fol. 37] but the name of the city, or town, or incorporated village, and of the county where located, must be entered in panel.

Do not confuse the political subdivisions "incorporated village" and "town."

Names of hamlets or postoffices other than incorporated villages are not wanted.

City: Plattsburg.

Town: ——.

Incorporated village: ——.

County: Clinton.

Schedule of Real and Tangible Personal Property in New York State by Cities, Towns and Incorporated Villages

City of	County of	Personal, actual value	Real estate, actual value	Real estate, assessed value
		$	$	$
		$	$	$
		$	$	$
		$	$	$
		$	$	$
		$	$	$

Town of	Incorporated village of	County of		
			$	$
			$	$
			$	$
			$	$
			$	$
			$	$

(If more space is needed add a paster)

[fol. 38]

Penalties

Any officer making a fraudulent report becomes personally liable to a fine of $1000.

The law provides a penalty of not more than $5,000 for neglect or refusal to file this report.

For failing, through negligence, to pay tax when due ten per cent of the tax due and unpaid plus interest at the rate of 1 per cent per month during the period in which it remains unpaid.

Information

The word "average" wherever it appears in this report has its plain, ordinary significance; neither the highest amount nor the lowest, but the mean.

In making report every space must be used except where the blank states that the spaces are not to be filled. Wherever no figures are to be inserted the word "none" should be inserted.

If there is no net income to be returned in answer to paragraph (8) insert the word "deficit" and state the amount thereof.

All corporations must make this report except the following:

(1) Real estate corporations wholly engaged in the purchase and sale of and holding title to real estate for themselves (this does not include so-called real estate companies having leasehold interests only, except as specified in subd. 2 below, or real estate agents or brokers).

[fol. 39] (2) Corporations engaged in the business of subleasing real property held under a leasehold for a term of twenty years or more, by the terms of which the taxes on the real property are paid by the lessee corporation as part of the consideration for the leasehold.

(3) Corporations whose sole business consists of holding stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the tax law.

(4) Transportation, transmission, heating, lighting and power corporations, insurance companies, banks, savings banks, trust companies and other corporations taxable under Sections 184 to 189 of the tax law, inclusive.

Simply to write "out of business," "never began business," "dead," et cetera, is not a sufficient compliance to relieve from the penal provisions of the statute.

Special Instructions to New Corporations

Corporations incorporated prior to July 1, 1925, which do not file an income tax report with the Federal Government for a period ending prior to July 1, 1925, must make this report showing status of company as of June 30, 1925. Items 8 to 12 inclusive may be answered by the words "No report made to the Federal Government" and other questions should be answered in accordance with instructions on this blank.

[fol. 40] Corporations incorporated between July 1, 1925 and November 1, 1925, will be supplied with Form 60 C. T. upon which a full report must be made on or before November 30, 1925.

This tax is due and payable on or before January 1, 1926, or within 30 days of billing date if billed after December 3, 1925. Do not send check with report.

Names, Residence Addresses, Compensation, etc., of Officers

Name and residence	Title	Salary	All other compensation	Number shares held	
				Preferred	Common
Leo Potter, New York	Pres	25,000	None	.....	100
J. W. Guilbord, Plattsburg	Secy & Treas	None	None	.....	2,000
W. M. Levy "	Vice Pres	None	None	.....	1,710

Must Be Answered

Information Required

(A) Gross sales from trading or manufacturing, less returns and allowances: $——.

(B) Gross profit from trading and manufacturing: $——.

(C) Gross profit from other than trading and manufacturing: $——.

(D) Entire assets: $——.

(E) Entire liabilities, excluding capital stock and surplus: $——.

[fol. 41] (F) Net worth as shown by balance sheet at end of calendar or fiscal year: $——.

(G) Number of people employed: Average 50 to 300.

(H) What was the total par value of all: (1) Federal bonds $ None; (2) Federal Farm Loans $ None; (3) State and Municipal Bonds $ None; (4) All other obligations shown in your return to the Federal Government and exempt from Federal Income Tax $ None.

(If none are held, insert the word "None.")

(Written across face:) Fiscal year not ended.

Form 3 IT. File with State Tax Department, (25) Albany, N. Y. Taxation of corporate franchises under article 9-a of the tax law. Thermiodyne Radio Corp. 10-24 Del. Plattsburg, N. Y. Report Due July 1, 1925.

[fol. 42] Affidavit of President, Vice-president, Secretary, or Treasurer

State of New York,
County of New York, ss:

On this 11 day of June, A. D. 1925, personally appeared before me, a Notary Public in and for the County of New York V. S. Johnson, Asst. Treas. of the above-named company who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct

and that it includes a true statement of the annual net income of said company for the year.

V. S. Johnson, Asst. Treas. (Official Title.)

Sworn to before me the day and year aforesaid.
Joseph B. Bell, Notary Public, Bronx County 180.
N. Y. County 1017. Comm. expires 3/30/27.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY

(Issuance of Stock)

It is hereby stipulated and agreed by the trustees of the above-named bankrupt estate and the New York State Tax Department, by their respective attorneys undersigned, as follows:

(1) That 196,800 shares of the capital stock of the above-named bankrupt were issued in consideration for the sale and transfer to the bankrupt of all of the assets, subject to all the liabilities, of Shepard-Potter Co., Inc., pursuant to an offer made to the bankrupt, which was conditional [fol. 44] upon the granting by the bankrupt to H. D. Williams & Co., 120 Broadway, New York City, of an option to purchase the remaining authorized shares of its capital stock, 4,200 shares at $7.14 on or before December 1, 1924; 21,000 shares at $7.14 on or before December 29, 1924; 28,000 shares at $7.14 on or before February 1, 1925; and 50,000 shares at $7.50 on or before July 1, 1925, but that of said amounts only 53,200 shares were issued.

(2) That a balance sheet of said Shepard-Potter Co., Inc., showing the condition of its books at or about the time of said transfer, is hereto annexed marked "A."

(3) That if the hearing on the objections to the claims hereinabove mentioned were reopened, the Trustees would produce witnesses who would be competent to testify and would testify that the fair value at or about the time of said

transfer of all of the assets of said Shepard-Potter Co., Inc., other than the assets designated on said balance sheet as "Advertising & Sales," "Engineering," "Organization" and "Patents, Trade-marks, Development & Prepaid Royalties," was less than the amount of accounts payable and notes payable shown on said balance sheet; and that the attorney for the State Tax Department would object to the introduction of such testimony as irrelevant and immaterial and if admitted would take an exception.

(4) That this stipulation may be made part of the record on the objections to said claims with the same effect as if [fol. 45] such hearing were reopened and such testimony offered, objection made and exception taken.

Dated New York, November 17, 1927.

Ralph M. Arkush, Attorney for Trustees. Albert Ottinger, W. M., Attorney for State Tax Department.

A

Victor L. Johnson, Industrial Accountant, Tax Accountant, Malone, N. Y.

October 28, 1924.

Shepard-Potter Co., Inc., Plattsburgh, N. Y., Balance Sheet

Assets			
Current:			
Cash on Hand	$2,930.70		
Accounts Receivable	56,808.59		
		$59,739.29	
Inventory:			
Merchandise	29,201.90		
Raw Materials	23,877.79		
Laboratory	3,160.70		
Printing & Stationery	1,200.00		
		57,449.39	
			$117,188.68
[fol. 46] **Prepaid Charges:**			
Advertising & Sales		30,701.97	
Engineering		6,444.97	
Organization		276.00	
Insurance		308.00	
			37,730.94
Fixed Assets:			
Equipment		17,363.05	
Patents, Trade-marks Development & Prepaid Royalties		284,352.15	
Advertising Cuts		383.96	
			302,099.16
Total			$457,018.78

Liabilities

Current:		
Accounts Payable	29,475.15	
Notes Payable	52,339.69	
		81,814.84
Proprietorship:		
Common Stock	100,000.00	
Preferred Stock	250,000.00	
Surplus	25,203.94	
		375,203.94
Total		$457,018.78

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY

(Certificate of Authority and Situs of Property)

It is hereby stipulated and agreed by the Trustees of the above-named bankrupt and the New York State Tax Department, by their respective attorneys undersigned, as follows:

(1) That if the hearing on the objections to the claims hereinbefore mentioned were reopened, the Trustees would produce witnesses who would be competent to testify and would testify that a certificate of authority under General Corporation Law, Section 15, was duly issued to the bankrupt in or about November, 1924, and that the real estate owned by the bankrupt on October 31, 1925, consisted of [fol. 48] land and buildings situated at Plattsburg, County of Clinton, State of New York, constituting a manufacturing plant; and that the attorney for the State Tax Department would object to the introduction of such testimony as irrelevant and immaterial and if admitted would take an exception.

(2) That this stipulation may be made part of the record on the objections to said claims with the same effect as if such hearing were reopened, such testimony offered, objection made and exception taken.

Dated New York, March 13, 1928.

Ralph M. Arkush, Attorney for Trustees. Albert Ottinger, R. R. S., Attorney General, Attorney for State Tax Department.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY

(Sale of Stock on October 31, 1925)

It is hereby stipulated and agreed by the Trustees of the above-named bankrupt estate and the New York State Tax Department, by their respective attorneys undersigned, that:

(1) If witnesses were produced on behalf of the Trustees on a further hearing of the objections filed by the Trustees to the above-mentioned claim, such witnesses would testify that sale of 1,400 shares of the capital stock of Thermiodyne Radio Corporation, the above-named Bankrupt, were made on the Exchange maintained by the New York Curb [fol. 50] Association on October 31st, 1925, at the following range of prices, to wit: High 9, Low 8, and that the witnesses so produced would be competent to establish such facts.

(2) That upon the offer of such testimony, the attorney for the State Tax Department would object to the admission thereof as irrelevant and immaterial on the ground that Section 214 of the Tax Law required an average market price for the entire year to be taken as one of the bases of the tax and not the market price on any particular day.

(3) That this Stipulation may be submitted to the Referee and constitute part of the record, in lieu of the testimony and objections above mentioned.

Dated New York, October 19th, 1927.

Ralph M. Arkush, Attorney for Trustees. Albert Ottinger, WM., Attorney for State Tax Department.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

REFEREE'S OPINION

Memorandum on Claims of the New York State Tax Department

License Fee and Franchise Tax

The Department of Taxation and Finance of the State of New York has filed in this proceeding a proof of claim for a license fee in the sum of Fifteen Thousand Dollars ($15,000.00), the same being a fee assessed against the bankrupt for the privilege of exercising its corporate franchise in carrying on its business in the State of New York. The amount of the tax is based upon the capital stock of the corporation, being Two Hundred and Fifty Thousand (250,000) shares without par value and the tax is six (6) cents per share. The Department of Taxation and Finance of the State of New York has also filed a claim for a franchise tax in the sum of Three Thousand Six Hundred and Twenty-five Dollars ($3,625.00).

To these two claims the trustees have filed objections upon the ground that the bankrupt is not indebted to the [fol. 52] State of New York for license fee or franchise tax in any sum whatsoever. Objection was made to the form of this objection by the State of New York on the ground that it was not sufficiently specific. The objection of the State of New York was overruled by the Referee and an exception was asked and granted. Thereafter the controversy was heard upon its merits.

Section 64a of the Bankruptcy Act provides:

"The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, District, or Municipality, * * * and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court."

The above section gives to the Court of Bankruptcy, I believe, the power to pass upon every aspect of a tax filed

against a bankrupt and to determine not only the question of the legality of the method of assessment of the tax but also the amount thereof, precisely as if no assessment had been made by a state taxing agency.

New Jersey vs. Anderson, 203 U. S. 483.
In re Hefferon Company, 216 Fed. 642.
In re F. C. Fisher Corporation, 229 Fed. 316.
In re United Five and Ten Cent Store, Inc., 242 Fed. 1005.
In re Anderson, 275 397.
Remington on Bankruptcy (3rd Ed.), Book 6, Paragraph 284.
Collier on Bankruptcy (13th Ed.), pages 1444 and 1445.

[fol. 53] The franchise tax of Fifteen Thousand Dollars has been assessed under Section 18 of Article 9 of the New York Tax Law, which provides, inter alia: "On the issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the state a license fee of six cents on each share employed in this state as hereinbefore provided." The referee does not see that it is necessary to determine whether or not the trustees are bound upon the return made by the bankrupt to the Tax Department for taxation purposes (New York State Tax Department, Exhibit One). The contention of the trustees that the bankrupt was engaged in interstate commerce does not seem pertinent. The decisions of the Appellate Division of the State of New York, cited upon the brief of the Attorney-General of New York, relate to domestic corporations upon which the license fee was sought to be imposed. The bankrupt was a corporation foreign to New York, merely licensed to do business therein.

Admittedly, a State may impose upon a domestic corporation such taxes as it sees fit before granting to it a franchise. A state cannot, however, compel a foreign corporation to pay a license fee based upon an arbitrary multiplication of a rate per share times the number of shares of outstanding capital stock of the corporation without regard to the value per share of the stock which it is taxing. In the case of Air-Way Electric Appliance Corporation vs.

Day (266 U. S. 71), 45 Supreme Court Reporter, at page [fol. 54] 15, Mr. Justice Butler delivered the opinion of the Supreme Court of the United States upon the question of the constitutionality of a tax analogous to that of the instant case attempted to be levied upon a Delaware corporation by the State of Ohio, as follows:

"It is clear that the mere number of authorized non par value shares is not a reasonable basis for the classification for the purpose of determining the amount of such annual fees. Such a classification is not based on anything for a relation to the purpose for which it is made. Southern Railway Company vs. Greene, 216 U. S. 400; Royster Guano Company vs. Virginia, 253 U. S. 412. The Act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. Martin vs. District of Columbia, 205 U. S. 135. Gast Realty Company vs. Schneider Granite Company, 240 U. S. 55. Kansas City Southern Railway vs. Road Improvement District, 256 U. S. 658. The act violates the equal protection clause of the Fourteenth Amendment."

People vs. Emerson, 271 U. S. 50.
Wickersham, Stock Without Par Value, Sec. 77.
38 Harvard Law Review, 361.

The claim of the State of New York for a license fee in the sum of Fifteen Thousand Dollars will therefore be disallowed.

The franchise tax is based on Article 9-A of the New [fol. 55] York Law which provides for a tax on business corporations based on net income. Section 219 provides for the computation of the tax on that portion of the entire net income of the corporation determined to be within the State of New York. It also provides for a minimum tax upon issued capital stock at its face value and then concludes: "But if such a corporation has stock without par value, then the basis of the tax, with relation to such stock, shall be such a portion of such issued capital stock, at not less than its actual or market value, and not less than Five Dollars ($5.00) per share, as may be determined by the Tax Commission as its gross assets employed in its business in this State bear to the entire gross assets employed in its

business." Pursuant to Article 9-A of the Tax Law, the bankrupt made a report showing that it was organized in October, 1924, under the laws of Delaware, that it began to do business in New York in November, 1924, that it had issued two hundred and fifty thousand (250,000) shares without par value, and that the amount paid in was Five Hundred and Eighty Thousand Dollars ($580,000.00). The bankrupt further reported that its total segregated assets wherever located were worth Two Hundred and Thirty Thousand Dollars ($230,000.00) and that its assets segregated to the State of New York amounted to the same sum. As additional information, the bankrupt reported that the average price at which the bankrupt stock was sold during the year was "high 22½; low, 6½" (New York State Tax Department, Exhibit One).

[fol. 56] The State Tax Department averaged the high price and low price and multiplied the average by the total number of outstanding shares of capital stock and assessed a tax of one mill per dollar against this total. The resulting tax thus claimed to be due was in the sum of $3,625.00. There is no testimony as to how many sales of capital stock of the bankrupt took place at the price of 22½ or 6½ or whether 14½ was a fair average of the market value of the stock. I therefore am of the opinion that the method of assessment employed by the New York State Tax Department was not such as was authorized by Section 214 of the New York State Tax Law, which has been quoted above. In the opinion of the referee there should be a reassessment of the tax on the basis of the value of the capital stock as of October 31st, 1925, as provided for by Section 214 of the New York State Tax Law. This value, according to the stipulation heretofore filed and made a part of the record of this case, was $8.50 per share. Therefore the assessment upon Two Hundred and Fifty Thousand (250,000) shares of the value of $8.50 per share would be Two Thousand One Hundred and Twenty-five Dollars ($2,125.00). This claim is of course entitled to priority.

Orders upon the said claims will be entered in conformity with this memorandum.

Dated, February 15th, 1928.

[fol. 57] In United States District Court

[Title omitted]

Referee's Order Rejecting Claim

Claim No. 116

And Now, to-wit, this Sixteenth day of February, A. D. 1928, upon the evidence submitted to the Referee upon the claim of State Tax Department, Albany, New York, for license fee in the sum of $15,000.00;

It is ordered by the Referee, that the said claim be disallowed and expunged from the list of claims.

(S.) John Biggs, Jr., Referee in Bankruptcy.

Filed February 16, 1928. Filed February 16th, 1928, 3 P. M. (S.) John Biggs, Jr., Referee.

[fol. 58] In United States District Court

[Title omitted]

Petition for Review of Referee's Order

To John Biggs, Jr., Esq., referee in bankruptcy:

Your petitioner respectfully shows that your petitioner is a creditor of the above-named bankrupt, and that its claim for license fee heretofore filed, in the sum of $15,000.00, (Fifteen Thousand Dollars), has been disallowed by the Referee herein, and that on the 16th day of February, 1928 an order, copy of which is hereto annexed, was made and entered herein;

That said order was, and is, erroneous, in that:

(1) The Referee erred in holding that Section 181 of the Tax Law of the State of New York, relating to the method of assessment of the amount of license fee upon the stock of a corporation having no par value, is unconstitutional, whereas said statute was a constitutional exercise of the power of the Legislature of the State of New York in de-

[fol. 59] termining the amount to be paid as license fee by

a foreign corporation, as a condition for permission to do business within the territorial jurisdiction of the State of New York; that the State of New York possessed the absolute power of exclusion of foreign corporations, and had the absolute right to fix and determine any tax or license fee as a condition for granting that which it could arbitrarily withhold:

(2) That the Referee erred in holding that the Legislature of the State of New York, in assessing a license tax of 6¢ (six cents) on each share of stock of no par value employed in this State, acted in an arbitrary and unconstitutional manner, whereas the legislative enactment upon which the claim of the State of New York for license fee rests was a reasonable exercise of the legislative discretion in placing foreign corporations doing business in the State of New York on equal terms with domestic corporations organized and doing business in said State, and designed to prevent foreign corporations from doing business to the disadvantage of domestic corporations deriving their proper rights and privileges from the State of New York;

(3) That the Referee erred in entertaining the defense of the unconstitutionality of Section 181 of the Tax Law of the State of New York, relating to assessment of license fee on stock of a foreign corporation having no par value, in that the corporation in this proceeding applied for and received the right to do business in the State of New York [fol. 60] upon the undertaking that, when the lapse of the statutory period made possible the determination of the proportion of its capitalization employed in business in the State of New York, it would pay the amount of license fee as then calculable, the amount thereof relating back to the date of receiving the privilege applied for from the State; that the corporation herein has availed itself of, and enjoyed the privileges and rights conferred by the State of New York in the issued permission to do business within said State, and that said corporation was and is, and that the Receiver and Trustee of said corporation, standing in its place, were and are, estopped and precluded from asserting the unconstitutionality of the statute relating to assessment of the license fee;

(4) That the Referee erred in entertaining any defense to the method of assessment of the license fee herein, on the ground that the said corporation had a remedy of review of the assessment of said license fee before The State Tax Commission of the State of New York, and, thru certiorari to the Supreme Court of the State of New York, under Section 199 of the Tax Law of the State of New York, which remedy of adjustment or review has not been taken by either the corporation or the Receiver or Trustee in this proceeding, and that, in the absence of exhausting such remedy, neither the Referee nor the U. S. District Court had any jurisdiction to review the finality of the assessment as made by the State Tax Commission of the State of New York.

[fol. 61] Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy law and General Order XXVII.

Dated New York City, N. Y., February 23, 1928.

Department of Taxation & Finance of the State of New York, Petitioner, by Albert Ottinger. Albert Ottinger, Attorney-General of the State of New York.

Claim No. 116.

In the District Court of the United States for the District of Delaware

No. 579. In Bankruptcy

In the Matter of Thermiodyne Radio Corporation, Bankrupt

And now, to-wit, this sixteenth day of February, A. D. 1928, upon the evidence submitted to the Referee upon the claim of State Tax Department, Albany, New York, for license fee in the sum of $15,000.00;

[fol. 62] It is ordered by the Referee that the said claim be disallowed and expunged from the list of claims.

(S.) John Biggs, Jr., Referee in Bankruptcy.

Filed February 16, 1928, 3 P. M. (Signed) John Biggs, Jr., Referee.

Duly sworn to by William Matthews. Jurat omitted in printing.

[fol. 63] In United States District Court

[Title omitted]

Referee's Certificate

To the Honorable Hugh M. Morris, Judge of the District Court of the United States for the District of Delaware:

I, John Biggs, Jr., the referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding an order, the original of which is made a part of this record, was entered on the 16th day of February, A. D. 1928.

That, on the 24th day of February, A. D. 1928, the Department of Taxation and Finance of the State of New York, a claimant in such proceeding, feeling aggrieved thereat, filed a petition for review, which was granted.

That the errors complained of by the petitioner are set forth in full in its petition.

That the record of the evidence upon which such order was based is annexed hereto.

That the questions presented on this review are:

[fol. 64] (1) Whether or not the referee erred in disallowing the claim of the Department of Taxation and Finance of the State of New York for a license fee in the sum of $15,000.00, as a preferred claim against the estate of the above named bankrupt.

(2) Whether or not the referee erred in disallowing the claim of the Department of Taxation and Finance of the State of New York for a license fee in the sum of $15,000.00 as a general claim against the estate of the above named bankrupt, and in ordering the said claim be expunged from the list of claims.

I hand up herewith for the information of the Judge, the following papers:

(1) The claim of the Department of Taxation and Finance of the State of New York filed in this proceeding.

(2) The objections of the trustees thereto.

(3) The Transcripts of the evidence taken at the hearing of the said claim.

(4) All exhibits.

(5) The order of the referee.

(6) The petition upon which this certificate is granted.

(7) All other papers filed with me herein which are pertinent to this review.

Respectfully submitted.

John Biggs, Jr., Referee in Bankruptcy.

February 24th, 1928.

[fol. 65] In United States District Court

[Title omitted]

Notice of Motion for Review of Referee's Order

Sirs: Please take notice, that upon the Certificate of Review, dated February 24, 1928, and duly filed by the Referee in the office of the Clerk of this Court on or about the said 24th day of February, 1928, and upon all the other papers and proceedings heretofore had herein, the undersigned will move this Court, at a stated term thereof, to be held at the Court House thereof, in the Federal Building in the City of Wilmington, Delaware, in said District of Delaware, on the 15th day of March, 1928, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order reversing the order of the Referee herein, dated February 16, 1928, disallowing and expunging from the list of claims in this proceeding the claim of the Department of Taxation & Finance of the State of New York for a License Fee in the sum of Fifteen Thousand ($15,000) Dollars as a preferred claim against [fol. 66] the estate of this bankrupt, and further directing that said claim be allowed in full as a priority claim, to-

gether with interest as claimed therein, and for such other, further or different relief in the premises as may be just.

Dated New York City, N. Y., March 3, 1928.

Yours, &c., Albert Ottinger, Attorney-General of the State of New York, Attorney for the Department of Taxation and Finance of the State of New York. Office & P. O. address: Capitol, Albany, N. Y. New York City Bureau: 49 Chambers Street, Bor. of Manhattan, City of New York.

To James I. Boyce, Esq., Dupont Building, Wilmington, Del.; Ralph M. Arkush, Esq., 37 Wall Street, Bor. of Manhattan, New York City, attorneys for trustees.

[fol. 67] In United States District Court

No. 579. In Bankruptcy

In the Matter of Thermiodyne Radio Corporation, Bankrupt

In re Petition for Review of Order of Referee Disallowing Claim of State of New York for $15,000 License Tax

Opinion—May 18, 1928

Upon this review of an order of the Referee disallowing a claim of $15,000 filed by the State of New York, the sole question is the constitutionality of the statute of New York upon which the claim is based. That statute, Section 181, Article 9, of the Tax Law of that state prescribes the "license fee" to be paid by a foreign corporation for the privilege of exercising its corporate franchises or carrying on its business in the State of New York. Acting under this statute the State Tax Commission, on December 21, 1926, fixed the amount of the license fee due by the bankrupt, a Delaware corporation, at $15,000 for which the claim was filed.

The clause of the Constitution, asserted by the trustee and held by the Referee to invalidate the statute, is that found in the Fourteenth Amendment forbidding a State to [fol. 68] "deny to any person within its jurisdiction the

equal protection of the laws." The part of the statute wherein the trustee finds more particularly the crux of the denial of equality to the bankrupt, all of whose 250,000 shares of issued capital stock is without par value, is that fixing without regard to the value of the shares or the assets represented thereby a fee of six cents on each such share employed in the State of New York of any corporation issuing shares without designated monetary value. It is not disputed that all of the outstanding shares of the bankrupt were employed in that state.

That a tax computed upon such basis is lacking in equality was settled by the Supreme Court, in Air-Way Corp. v. Day, 266 U. S. 71, 85, where the Court, considering the validity of an Ohio statute prescribing an annual fee computable in like manner and payable by each foreign corporation having stock without par value, said:

"It is clear that the mere number of authorized non par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. Southern Ry. Co. v. Greene, 216 U. S. 400, 417; Royster Guano Co. v. Virginia, 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its applica-[fol. 69] tion. Martin v. District of Columbia, 205 U. S. 135, 139; Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 58; Kansas City Southern Ry. Co. v. Road Improvement District, 256 U. S. 658, 660. The act violates the equal protection clause of the Fourteenth Amendment."

The State of New York, however, as I understand it, makes no contention that the statute is productive of equality. On the contrary, showing that a foreign corporation is not a citizen within the meaning of Article 4, Section 2, of the Federal Constitution, Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246; National Council U. A. M. v. State Council, 203 U. S. 151; Horn Silver Mining Co. v. New York, 143 U. S. 305; Philadelphia Fire Association v. New York, 119 U. S. 110; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Norfolk, &c. R. R. Co. v. Penn., 136

U. S. 114, and that a foreign corporation must first have come within the jurisdiction of the taxing state before it can claim the protection of the Fourteenth Amendment against discriminatory legislation, Sully v. American National Bank, 178 U. S. 289, 303; Blake v. McClung, 172 U. S. 239, 260, it urges only that the fee here sought to be collected, being for the privilege of the bankrupt's exercising its corporate franchises in the State of New York during the first year in which its business was there carried on, is a tax made in legal contemplation against a person not "within its jurisdiction" and, consequently, not within the Fourteenth Amendment. The line of demarcation [fol. 70] separating foreign corporations that are without the equal protection clause from those that come within it was graphically depicted by the Supreme Court in Hanover Ins. Co. v. Harding, 272 U. S. 494, 510-517, where it was said:

"In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind.

"In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations, in engaging in business within the State.

. . . . . .

"By compliance with the valid conditions precedent, the [fol. 71] foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the State; and tax laws made to apply after it has been so received into the State are to be considered laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment. * * *"

The Validity of the Statute, and so of the claim, is thus made to turn upon whether or not the statute in question prescribes conditions precedent to the admission of the foreign corporation to quasi citizenship or applies to the foreign corporation only after all conditions precedent have been complied with and the corporation been duly received into the State. In solving this problem Section 181 of the Tax Law must be considered in connection with Sections 15 and 16 of the General Corporation Law of the State of New York. Section 15 provides:

"No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business * * *. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. * * * No foreign stock corporation doing business in this state shall maintain any action [fol. 72] in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. * * *

Section 16 requires:

"Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice president or other acting head, particularly setting forth

the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state. * * *"

The part of Section 181 of the Tax Law with which we are concerned reads thus:

"Every foreign corporation * * * doing business in this State, shall pay for the use of the State a license fee of 1/8 of 1 per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital stock employed by it within this State during the first year of carrying on its business in this State. * * * The measure of the amount of capital stock employed in this State shall be such [fol. 73] a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the State a license fee of 6 cents on each share employed in this State as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fee shall be paid shall be fixed by the State Tax Commission, which shall have the same authority to examine the books and records in the State of such foreign corporation, and the employees thereof, as it has in the case of domestic corporations, and the State Tax Commission shall have the same power to issue a warrant for the collection of such license fees as now exists with regard to domestic corporations."

Prior to the passage of the last quoted section the Court of Appeals of the State of New York, in Lancester v. A. I. Co., 140 N. Y. 576 (1894), held that a foreign corporation, after filing the papers and procuring the certificate required

by Section 15 of the General Corporation Law, has the same right to transact business in that State as domestic corporations. That the enactment of Section 181 of the Tax Act was not a legislative nullification or modification of that decision is revealed by the section itself which makes the carrying on of business in the State of New York a [fol. 74] necessary prerequisite and condition precedent to the computation of the tax to be levied under that section. As held in Wood & Selick v. Ball, 190 N. Y. 217, there is in the Tax Law, Section 181, "A command to pay a license fee for the privilege of carrying on business in this state, but not until business has been carried on for a longer or shorter period, varying according to circumstances. • • • It cannot be paid in advance for it must first be computed and the computation is made on the basis of the capital stock employed in this State, which cannot be known in advance." Furthermore, the Courts of the State of New York have held that compliance with the provisions of Section 15 of the General Corporation Law and the procurement of the certificate required thereby, not payment of the fee under Section 181 of the Tax Act, are the conditions precedent, compliance with which put the foreign corporation on a level with domestic corporations. In Manufacturers' Commercial Co. v. Blitz, 131 A. D. 17 (1909), it was held that proof of compliance with Section 15 must be made by the plaintiff in an action by a foreign corporation whereas proof of non-compliance with Section 181 of the Tax Law is a matter of defense and must be pleaded and proved by the defendant. Halsey v. Jewett Dramatic Co., 190 N. Y. 231, decided that the failure of a complainant in an action by a foreign corporation to allege payment of the license fee is not a demurrable defect. Other cases have gone further and expressly decided that the provisions of Section 181 of the Tax Law constitutes a condition subsequent to the right of a foreign corporation [fol. 75] to carry on business within the State while the requirements of Section 15 of the General Corporation Law are conditions precedent. In fact, in Wood & Selick v. Ball, the Court of Appeals held not only that the provisions of Section 181 of the Tax Law constitute a condition subsequent but expressly stated that the Tax Law, Section 181, "Is a Revenue Act," while the General Corporation Law,

Section 15, is designed "to prescribe the conditions upon which foreign stock corporations may do business in this State."

. These decisions of the Courts of the State of New York make it manifest, I think, that Section 181 of the Tax Law of that State is of the character that the Supreme Court, in Hanover Insurance Co. v. Harding, 272 U. S. 494, held "must conform to the equal protection clause of the 14th amendment, while Air-Way Corp. v. Day, 266 U. S. 71, makes it equally obvious that the part of the statute pertaining to non-par stock does not so conform. As a result I see no escape from the conclusion that the statute under which the excise tax here in question was levied is unconstitutional and the tax invalid.

For these reasons the petition for review must be dismissed and the order of the Referee disallowing the claim must be affirmed.

(Sgd.) Hugh M. Morris, J.

May 18, 1928.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk, by G. M. Bowdle, Deputy Clerk. (Seal.)

[fol. 76] In United States District Court

No. 579. In Bankruptcy

In the Matter of Thermiodyne Radio Corporation, Bankrupt

In re Petition for Review of Order of Referee Disallowing Claim of State of New York for $15,000 License Tax

Order Appealed From

And now, to wit, this 23rd day of May, A. D. 1928, the petition of the State of New York for a review of the order of the Referee disallowing the claim of the State of New York in the above stated cause for a License Fee in the sum of Fifteen Thousand Dollars ($15,000) having come on to be heard upon the record and having been argued by counsel, upon consideration thereof;

It is ordered, adjudged and decreed by the Court that the order of the Referee rejecting, disallowing and expunging the said claim from the list of claims upon the record in the above stated cause be and the same hereby is affirmed and that the said petition of the State of New York be and it hereby is dismissed.

Hugh M. Morris, D. J.

[fol. 77] In United States District Court

[Title omitted]

Stipulation as to Contents of Record

It is hereby stipulated and agreed by and between the solicitor for the appellants and the solicitor for the re-
[fol. 78] spondents above named, that pursuant to Rule of the United States Circuit Court of Appeals for the Third Circuit, the transcript of the record for the purpose of the appeal of the People of the State of New York from the order made herein May 23rd, 1928, shall contain the following:

Notice of Appeal.
Petition for appeal and allowance thereof.
Assignment of Errors.
Citation on Appeal.
Proof of Claim.
Referee's Notice of Objection to Claim.
Trustees' Notice of Rejection of Claim.
Minutes of hearing, exhibits and stipulations as to testimony.
Referee's opinion.
Referee's order rejecting claim.
Petition for review of referee's order.
Referee's Certificate.
Notice of Motion for Review of Referee's Order.
Opinion of the District Court.
Order Appealed from.
Stipulation as to Contents of Record.
Stipulation as to Corrections of Record.
Clerk's Certificate.

Dated July 15th, 1928.

Albert Ottinger, Attorney General of the State of New York, Solicitor for Claimants-Appellants. Ralph Montgomery Arkush, Solicitor for Trustees-appellees.

[fol. 79] UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE AS TO CORRECTNESS OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States Dis-
[fol. 80] trict Court for the District of Delaware in the above entitled matter as agreed upon by the parties.

Dated New York, July 15th, 1928.

Albert Ottinger, Attorney General of the State of New York, Solicitor for Claimants-Appellants. Ralph Montgomery Arkush, Solicitor for Trustees-Appellees.

[fols. 81 & 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] Minute entry of argument and submission, October 2, 1928, omitted in printing.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3897 (List No. 2)

PEOPLE OF THE STATE OF NEW YORK, Appellant,

vs.

GAMBLE LATHROP et al., Trustees Thermiodyne Radio Corp., Bankrupt, Appellees

ORDER ASSIGNING JUDGE—Filed Oct. 2, 1928

And now, to-wit, this second day of October, A. D. 1928, it is ordered that Hon. William H. Kirkpatrick, District

Judge, for the Eastern District of Pennsylvania, be, and he is hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 85] In United States Circuit Court of Appeals

[Title omitted]

On Appeal from the United States District Court for the District of Delaware

Before Woolley and Davis, Circuit Judges, and Kirkpatrick, District Judge

Opinion—Filed Oct. 31, 1928

Per Curiam:

Affirmed on the opinion of Judge Morris.

[File endorsement omitted.]

[fol. 86] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1928

No. 3897 (List No. 2)

The People of the State of New York, Appellant,

vs.

Gamble Latrobe et al., Trustees Thermiodyne Radio Corp., Bankrupt, Appellees

Judgment—Filed Oct. 31, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the

said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, October 31, 1928.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 87] In United States Circuit Court of Appeals

[Title omitted]

Assignment of Errors—Filed Dec. 21, 1928

And now comes the appellants, The People of the State of New York, by their counsel Albert Ottinger, Attorney-General of the State of New York, and respectfully represent that they feel themselves aggrieved by the proceedings and decree of United States Circuit Court of Appeals for the Third Circuit in the above entitled cause, which said decree was entered December 1st, 1928, and affirmed an order or decree entered in the District Court of the District of Delaware on the 23d day of May, 1928, expunging the claim of the People of the State of New York for a license fee assessed against the Thermiodyne Radio Corporation under Section 181 of the Tax Law of the State of New York on the ground that the statute under which same was assessed violated the provisions of the Constitution of the United States and assign error thereto as follows:

First. That the Court erred in affirming the order of the District Court of the United States for the District of Delaware disallowing the claim for license fee or tax of the [fol. 88] People of the State of New York in the sum of $15,000. That the Court, in making said decree or judgment, held that Section 181 of the Tax Law of the State of New York, providing for the assessment of Six Cents a share on stock of no par value, was a statutory enactment in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and was unconstitutional, whereas in law and in fact such statutory enactment providing for a license fee payable by for-

eign corporations seeking to do business in the State of New York was a constitutional exercise of the taxing power of the State of New York and in none of its terms and conditions violated any of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Second. That the Court erred in making the judgment or decree complained of and holding Section 181 of the Tax Law of the State of New York relating to the method of assessment of the amount of license fee on the stock of a corporation having no par value unconstitutional, whereas said statute was a constitutional exercise of the power of the Legislature of the State of New York in determining the amount to be paid as a license fee by a foreign corporation, as a condition for permission to do business in the territorial jurisdiction of the State of New York; that the State of New York possessed the absolute power of exclusion over foreign corporations and had the absolute right to fix any tax or license fee as a condition for granting that which it may arbitrarily withhold.

Third. That the Court erred in making the judgment or decree complained of holding that Section 181 of the Tax Law of the State of New York violated the Equal Protec- [fol. 89] tion Clause of the Fourteenth Amendment of the Constitution of the United States and was unconstitutional by reason thereof, whereas in law and in fact the provisions of Section 181 of the Tax Law of the State of New York applied in equal degree to all foreign corporations seeking to do business in the State of New York and operated equally in like manner on all corporations falling in particular classifications of foreign corporations.

Fourth. That the Court erred in making the decree or judgment complained of and holding that the Legislature of the State of New York, in assessing the license fee or tax of Six Cents on each share of stock of no par value employed in this State acted in an arbitrary and unconstitutional manner, whereas the Legislative enactment upon which the claim of the State of New York for license fee rests was a reasonable exercise of the Legislative discretion in placing foreign corporations doing business in the State of New York on equal terms with domestic corporations organized and doing business in said State, and the provisions

of Section 181 of the Tax Law of the State of New York was designed to prevent foreign corporation- from doing business to the disadvantage of domestic corporations deriving their proper rights and privileges from the State of New York.

Fifth. That the Court erred in making the judgment or decree complained of in entertaining the defense of the unconstitutionality of Section 181 of the Tax Law of the State of New York, relating to the assessment of a license fee on the stock of a foreign corporation having no par value, in that the Thermiodyne Radio Corporation, the bankrupt, in this proceeding, as all foreign corporations do prior to the assessment and payment of the license fee in question, applied for and received the right to do business in the State [fol. 90] of New York upon the undertaking that, when the lapse of the statutory period made possible the determination of the proportion of its capitalization employed in business in the State of New York, it would pay the amount of license fee as then calculable, the amount thereof relating back to the date of the receipt of the privilege applied for in the State of New York; that the bankrupt corporation herein, in manner similar to all foreign corporations receiving license to do business in the State of New York under the statute involved in this proceeding, has availed itself of and enjoyed the privileges and rights conferred by the State of New York in the issued permission to do business within the said State, and that said corporation was and is, and that the appellees, the trustees and receivers of said corporation, standing in its place, were and are, estopped and precluded from asserting the unconstitutionality of the statute relating to the assessment of the license fee, a result which applies to all foreign corporations liable to the payment of the license fee involved in this case.

Sixth. That the Court erred in making the judgment or decree complained of and holding that the valuation of stock of no par value was determinable by the value of assets of the corporation used by it in the transaction of business in the State of New York during the period of one year subsequent to the issuance of the license to transact business in the State of New York; whereas in law and in fact the license fee exacted by the State of New York under

Section 181 of the Tax Law of said State of New York was for the admission of the corporation to the State of New York for the transaction of its business therein and was not dependent upon any business actually transacted or any assets except as the amount of said assets are necessary [fol. 91] to be determined to insure a proper segregation of the stock of said corporation so as to determine the proportion thereof employed in the State of New York and thus further to determine the amount that the corporation should pay, in accordance with its stipulated agreement for the license issued to it to transact business in the State of New York.

Wherefore the appellants pray the Honorable Court to examine and correct the errors assigned and for a reversal of the decree of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case. That the appellants may have an adjudication and decree in their favor holding that Section 181 of the Tax Law of the State of New York in so far as the same relates to the method and procedure for the assessment of the license fee against the Thermiodyne Radio Corporation, bankrupt, was constitutional and not repugnant to any of the provisions of the Constitution of the United States and that the claim of the People of the State of New York for license fee amounting to $15,000 regularly and duly assessed under said statute is a valid priority claim against the estate of the said bankrupt and payable as such by the trustees and receivers thereof.

Dated December 10, 1928.

Albert Ottinger, Attorney-General of the State of New York, Attorney for Appellants, The People of the State of New York, Office & Post Office address: Capitol, Albany, N. Y.

[File endorsement omitted.]

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted.]

NOTICE OF APPEAL—Filed Dec. 21, 1928

SIR:

Please take notice that The People of the State of New York hereby appeal to the Supreme Court of the United States from the judgment made herein on the 1st day of December, 1928, affirming the decree of the District Court of the United States for the District of Delaware, dated May 23d, 1928, expunging the claim of The People of the State of New York for a license fee amounting to $15,000 and from the whole and each and every part of said judgment and decision. This appeal is taken pursuant to Sections 239 and 240 of the Judicial Code.

Dated New York, N. Y., December 15th, 1928.

Yours, etc., Albert Ottinger, Attorney-General of the State of New York, Attorney for the Petitioners-appellants, The People of the State of New York. Office & Post Office address: Capitol, Albany, N. Y.

To Ralph Montgomery Arkush, Esq., attorneys for trustees in bankruptcy, appellees, 15 Broad Street, New York City, N. Y.

[fol. 93] [File endorsement omitted.]

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Dec. 21, 1928

The above entitled appellants, The People of the State of New York, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit and that a judgment has

therein been rendered on the 1st day of December, A. D. 1928, affirming an order of the United States District Court for the District of Delaware, dated May 26th, 1928, affirming the order of the referee in bankruptcy made in the matter of the Themiodyne Radio Corporation, No. 579 in Bankruptcy, disallowing, rejecting and expunging the claim of The People of the State of New York from the list of claims amounting to $15,000 for a license fee under Section 181 of the Tax Law of the State of New York filed against said bankrupt upon the ground that Section 181 of the Tax Law of the State of New York, in as far as it provided for the assessment of Six Cents per share upon stock of foreign corporations employed in the State of New York during the first year of their operation in said State under a license granted by the State of New York, was un- [fol. 95] constitutional and enacted in violation of the Fourteenth Amendment of the Constitution of the United States.

That the matter in controversy in said suit exceeds One thousand Dollars besides costs. That the determination hereinbefore set forth is one in which is drawn in to question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution of the United States in the decision heretofore rendered by the Circuit Court of Appeals for the Third Circuit against its validity.

That the appellants herein rely upon the validity of the said State statute in the assertion of the aforesaid claim for license fee filed against the bankrupt and the case is one specified in Section 240 of the Judicial Code, subdivision b, in which the appellants are entitled to a review by the Supreme Court of the determination rendered upon an appeal from the determination made holding the statute relied upon as unconstitutional. That the only question involved in this case is whether or not Section 181 of the Tax Law of the State of New York, in as far as it provides for the payment of a license fee of Six Cents per share on all stock of no par value employed by foreign corporations in the State of New York during the first year following the receipt of license to do business in the State of New York, is constitutional under the provisions of the Constitution of the United States, and that it is a proper case to

be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme [fol. 96] Court of the United States so that the errors complained of in the assignment of errors herein filed by the said appellants may be reviewed and if error be found, correct it according to the laws and customs of the United States.

Dated N. Y. Dec. 10, 1928.

Albert Ottinger, Attorney-General of the State of New York, Attorney for the Petitioner, The People of the State of New York. Office & Post Office address: Capitol, Albany, N. Y.

And now, to wit, this 10th day of December, A. D., 1928, upon reading and considering the foregoing petition, it is, upon motion of Albert Ottinger, Esq., Attorney-General of the State of New York, attorney for appellants,

Ordered by the Court that the appeal in the above entitled case to the Supreme Court of the United States be and hereby is allowed as prayed for. The appellees, the Trustees of the said bankrupt, Thermiodyne Radio Corporation, by James I. Boyce, their attorney, waiving the giving of bond for costs, no order as to bond is made.

Victor B. Woolley, United States Circuit Judge for the Third Circuit.

[fol. 97] In United States Circuit Court of Appeals

[Title omitted]

Waiver of Bond

The Appellees, Gamble Latrobe, Jr., James P. Knowles and William S. Erichs, Trustees in Bankruptcy of Thermiodyne Radio Corporation, hereby waive the filing of a bond by the appellants, The People of the State of New York,

in connection with the appeal to the United States Supreme Court from the judgment rendered by the United States Circuit Court of Appeals for the Third Circuit affirming the decree of the District Court of the United States for the District of Delaware, dated May 23d, 1928, expunging the claim of The People of the State of New York for license fee amounting to $15,000 upon the ground that the statute under which the same was assessed was unconstitutional under the provisions of the Constitution of the United States.

Dated Wilmington, Delaware, Dec. 10th, 1928.

James I. Boyce, Attorney for Appellees, Gamble Latrobe, Jr., et al., Trustees in Bankruptcy of Thermiodyne Radio Corporation.

[File endorsement omitted.]

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF AMOUNT IN CONTROVERSY—Filed Dec. 21, 1928

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert P. Beyer, being duly sworn, on his oath, says: That he is a Deputy Assistant Attorney-General of the State of New York and is personally acquainted with the nature, amount and extent of the claim filed by the State of New York against the estate of Thermiodyne Radio Corporation, bankrupt, and that said claim amounts to the sum of $15,000 for license fee for the privilege of exercising the corporate franchises for carrying on its business for the first year following the receipt of license to do business based on amount of capital stock of no par value employed in the State of New York during said period pursuant to Section 181 of the Tax Law of the State of New York, which claim has been rejected in its entirety for the sole ground that the statute under which it was

assessed is unconstitutional under the provisions of the Constitution of the United States and the matters referred to are in controversy in this suit and the amount in controversy amounts to the sum of $15,000 exclusive of interest and costs.

Robert P. Beyer.

Sworn to before me this — Dec., 1928. Abraham J. Lifton, Commissioner of Deeds, City of New York. New York (Clk. 16 Reg. 7-0), Kings (Clk. 114 Reg. 103), Bronx (Clk. 1 Reg. 30000), Queens (Clk. 1352 Reg. 1063), and Richmond. Commission expires Jan. 17, 1930. (Seal Commissioner of Deeds, City of New York.)

[fol. 99] [File endorsement omitted.]

[fol. 100] Citation, in usual form, filed December 21, 1928, omitted in printing.

[fol. 101] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 102] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation to Print Entire Record—Filed Jan. 2, 1929

The following is a definite Statement of Points on which the appellant intends to rely and on the parts of the records which he thinks necessary for the consideration thereof.

Points

1. The license exacted by the State of New York from foreign corporation seeking to do business in that State is distinguishable, in its assessment and nature, from a franchise tax.

2. The license fee imposed on a foreign corporation is similar to the organization tax imposed by the State on domestic corporations.

3. A foreign corporation is entitled to do business in the State of New York only at the discretion of such State, and under such terms and conditions as it may see fit to enforce. Such corporation is not, therefore, entitled to contest the constitutionality of the State statute embracing the conditions, assented to by the corporation, under which the certificate of the right to do business was granted.

4. The case of Air Way Co. v. Day, 226 U. S. 71, upon the authority of which the district court decided this case adversely to the appellants, is not controlling.

[fol. 103] 5. The determination of the amount of the license tax rests in the uncontrolled discretion of the State of New York.

6. No discrimination between foreign corporations liable to the payment of the license fee existed.

7. Section 181 of the Tax Law of the State of New York providing for the rate and assessment of license fee on foreign corporations having stock of no par value is not unconstitutional.

A certified copy of the transcript of the record in the United States Circuit Court of Appeals for the Third Circuit has been filed with the Clerk of this Court, and such certified copy of said record as filed is necessary to be printed by the Clerk of this Court in order to obtain adequate consideration of the questions involved in this appeal.

Dated New York, N. Y., December 31st, 1928.

Albert Ottinger, Attorney-General of the State of New York, Attorney for the Claimants-appellants.
Robert P. Beyer, Deputy Assistant Attorney-General of the State of New York, 49 Chambers Street, New York City.

To Charles Elmore Cropley, Clerk of the U. S. Supreme Court, Washington, D. C.; to Ralph Montgomery Arkush, Esq., Attorney for the Trustees-appellees, 15 Broad Street, New York City.

[fol. 104] Copy received this 31st day of December, 1928. Ralph M. Arkush, atty. for Trustees, Appellees.

[fols. 105-109] [File endorsement omitted.]

Endorsed on cover: File No. 33,910. U. S. Circuit Court of Appeals, Third Circuit. Term No. 601. The People of the State of New York, appellants, vs. Gamble Latrobe, Jr., James P. Knowles, and William S. Erichs, trustees. etc. Filed December 26th, 1928. File No. 33,910.